In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, PLAINTIFFS IN ERROR,
v.
CHARLES LOUGHREY AND MILES H. WHEELER, DEFENDANTS IN ERROR.

No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SEVENTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

This is a writ of error sued out by the United States from a judgment rendered against it in an action of trover brought upon an agreed statement of facts (Rec., pp. 5–16) for the recovery of the value of certain timber cut by the defendants in error from certain lands in the State of Michigan, alleged to be the property of the United States. Briefly, those facts are as follows:

It is conceded that the defendants in error, prior to the 1st of March, 1888, cut and removed from the north

half of the northwest quarter, and the northwest quarter of the northeast quarter and the southeast quarter of the northeast quarter of section 13, in township 44, range 35 west, in the State of Michigan, 400,000 feet of pine timber, and converted the same to their own use. It is not pretended that the defendants in error had or claimed any right, title, interest, possession or right of possession in the lumber so cut, and although it is stipulated in the second division of the stipulation that "such cutting and taking of said timber by the defendants from the said land was not a willful trespass," this, we take it, is a mere stipulation going to motive, for the purpose of avoiding punitive damages, and is not in anywise to be regarded as a claim of right.

It is further stipulated that none of the lands in question were ever owned or held by any party as a homestead, and that the value of the timber was $7 per 1,000 feet, board measure. It is agreed that the lands above described were a part of the grant of land made to the State of Michigan by an act of Congress of the United States approved on the 3d of June, 1856 (11 Stat. L., ch. 44, p. 21), and that the said lands were accepted by the State of Michigan by an act of its legislature approved February 14, 1857 (Public act No. 126, Laws of Michigan for year 1857), and were a part of the lands of said grant within the 6-mile limit, outside of the common limits, certified and approved to the State by the Secretary of the Interior to aid in the construction of the railroad mentioned in said act No. 126 of the Laws of Michigan for the year 1857, to run from Ontonagon to

the Wisconsin State line, and denominated the Ontonagon and State Line Railroad Company. It is further conceded that said railroad was never built, and that the lands above described were never earned by the construction of that or any other railroad.

Although it is not contained in the agreed statement of facts, yet the fact is, as appears from the public laws and from the decisions of this court, that on March 2, 1889, the United States, by act of Congress (25 Stat., 1008), forfeited this Ontonagon grant and restored the land so granted to the public domain. The action in this case was begun on August 16, 1890 (Rec., p. 2, folio 3). And it is also a fact that on the 21st of February, 1867 (1 Laws Michigan, 1867, p. 317), the legislature of Michigan passed a joint resolution for the restoration of this land to the United States, and authorizing the governor of that State to release said lands to the United States, and subsequently, by a formal release, the governor of the State of Michigan reconveyed said lands to the United States on August 14, 1870, which was held by this court to be beyond the scope of his power, the court being of opinion that this act of the Michigan legislature referred to the Marquette and not to the Ontonagon road. (See *Lake Superior Ship and Canal Railway and Iron Company* v. *Cunningham*, 155 U. S., 354.)

Under this condition of facts, the court below rendered judgment in favor of the defendants in error, holding as a matter of law that inasmuch as this grant by the United States to the State of Michigan for the purpose aforesaid was a grant *in præsenti*, that title to said land remained

in the grantee unless, except, and until said title was formally retaken by the United States by Congressional act of forfeiture or appropriate judicial proceedings for that purpose, and that inasmuch as title to the said land was not in the plaintiffs in error at the time of the cutting of the timber, that therefore the action of trover could not be maintained. To review this decision a writ of error has been sued out from this court.

ASSIGNMENT OF ERRORS.

The court erred:

First. In holding that the title to the timber cut from the land, or the title to the land itself, was not in the United States at the time of said conversion.

Second. In rendering judgment in favor of the defendants in error and against the plaintiffs in error.

Third. In failing to hold that at the time of the conversion of said timber, the title ownership, and right of possession was in the plaintiffs in error.

ARGUMENT.

I.

Where title to the land upon which the lumber was cut is in the United States, the severing of timber from the realty does not change the title. The character of the lumber by the act of felling is changed from realty to personalty, but its title is not affected. It continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of

the wrongful removal or conversion of personal property. This is the rule laid down by Mr. Justice Field in the case of *Hallock* v. *Mixer* (16 Cal., 574), when he was chief justice of the supreme court of that State, and was subsequently reannounced by that learned jurist in the case of *Schulenberg* v. *Harriman* (21 Wall., 44, 64), and this rule has been since adhered to by this court. (*Northern Pacific Railway Company* v. *Lewis*, 162 U. S., 366, 374; *United States* v. *Steenerson*, 4 U. S. App., 332, 345.)

This being true, we come to inquire in whom was title to the land from which this timber was cut at the time of the institution of this action. It is true that by the act of June 3, 1856 (11 Stat., p. 21), the United States granted this land *in presenti* to the State of Michigan to aid in the construction of a railroad, but it is also true that by the act of March 2, 1889, the grant of the land in question was revoked and the title thereto revested in the United States, and the said land was thereby restored to the public domain (25 Stat., p. 1008). The action in the case at bar was not brought until September 16, 1890. Upon this phase of the question the learned court below ruled against the contention of the Government because the act of forfeiture was not passed until a year after the cutting of the timber, without adverting in anywise to the fact that the action for the timber was brought more than a year subsequent to the act of forfeiture; and the learned court below was also doubtful whether this act of forfeiture above recited embraced the lands in question, inasmuch as that act did not purport to apply to all the lands granted by the act of June, 1856, to the State of Michigan, but to only such portions of the land granted

as were opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted. (See court's opinion, Rec., p. 18, folio 32.)

Upon the latter doubt, as expressed by the learned court below, it seems to us there can be no question. It is true that this act of forfeiture did not describe the land in question by metes and bounds, but the act does in terms apply to all lands opposite to or coterminous with the uncompleted portion of any railroad. It is notorious that the railroad in aid of which this land was granted to the State of Michigan was never built, and it is stipulated in the agreed findings of fact that the land here drawn in question was never earned by any railroad. (See *R. R.* v. *Cunningham*, 155 U. S., at 367.) Manifestly, therefore, this land is embraced both in the spirit and in the letter of the act of forfeiture of March 2, 1889, and by that act title thereto was revested in the United States. The learned court below, however, though apparently conceding this point, was of opinion that such title was not sufficient to maintain trover, inasmuch as title to the land was not vested in the United States at the time of the conversion of the timber by the defendants in error, who were mere trespassers, and who did not make any claim of right, title, or interest in or to the property, and permitted such bare trespassers to defeat the action of trover by setting up a mere naked title in the State of Michigan, without in any wise connecting themselves with the State of Michigan as claimants or beneficiaries under any right or authority derived from that State. This, we submit, was error.

First. The Congressional revocation of this grant was made on March 2, 1889. This action was begun on September 16, 1890. At the time of suit, therefore, the Government had the strict legal title to this land, and we submit that by relation the title was good at the time of the felling of this timber and its conversion by a mere stranger, a trespasser upon the land, who did not even claim any right, title, or interest in the property.

The case which most nearly approaches the one at bar in its facts is that of *Musser* v. *McRae* (44 Minn., 343, 347). In that case there was an act of Congress granting lands to the State of Wisconsin in aid of a railroad which provided that it should be lawful for agents appointed by the railroad company entitled to the grant to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States "deficiency" lands, and it was held that the issuance of a patent by the United States directly to the railroad company for lands so selected by an agent of the company was evidence that the company had complied with all the conditions of the grant and was entitled to the lands described therein, and that the title passed from the United States at the date of such selection. It also appeared that after these deficiency lands had been earned in this wise by the railroad company and had been so selected and duly certified to the General Land Office, but prior to the issuance of the patent, timber had been wrongfully cut and removed therefrom by trespassers; and it was held that the title acquired by the patent must be held to relate back to the selection of the lands, so as to save to purchasers to whom the

lands had been granted by the company before the trespass a right of action for the timber wrongfully removed from the land, or its value. The court in that case said:

> The doctrine of relation is founded in equitable principles, and the party claiming its application must show an equity in his favor. It is a fiction of law resorted to for the advancement of right and justice—*ut res magis valeat quam pereat*—though it is not allowable when it would defeat the rights of third persons. But as it is admitted that the defendants were naked trespassers, they have no such rights to interpose here. Nor will the doctrine be so applied as to relieve a trespasser from all responsibility for his wrongful act. But the principle is contended for here to preserve to the plaintiffs the right of action to recover the timber or its value wrongfully taken by the defendants, and there seems to be no reason why it may not be so applied for the advancement of justice and to give the full effect to the grant it was intended to have. In *Landes* v. *Brandt* (10 How., 348, 372), the court cited with approval the language of Cruise on Real Property (vol. 5, p. 510): "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." * * * In *Landes* v. *Brandt*, *supra*, where a party had filed his claim and taken the initiatory steps to obtain title under a Spanish grant, and this right and title was sold on execution before the decision of the commissioners who were to pass on the validity of that claim, but which was subsequently confirmed by them and a patent long afterwards issued, it was held that the confirmation in

> 1811 and the patent issued in 1845 must be held to relate to the first act—that of filing the claim in 1805—so as to protect the rights of the execution creditor. So in *Heath* v. *Ross* (12 John, 140), which was an action of trover for timber cut between the application for and date of a patent from the State and its enscaling and delivery by the secretary of state, the title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer for the value of the timber cut and carried away in the meantime.

The case of Heath *v.* Ross (12 Johns., N. Y., 140), is entirely similar in principle to the case at bar. It was an action of trover for timber cut between the application for and date of a patent from the State. In holding that the plaintiff's title related back to the date of application, the court said:

> But the application of this fiction to the case before us will produce no such result, for the defendant and the person from whom he purchased *knew that neither of them had any title to the lot or right to cut the timber. They both supposed it belonged to the State;* and the plaintiffs having obtained this title by grant, which, as between them and the State would relate back to a time before which any of the timber was cut, *must draw after it a right to the timber also. The State can have no claim upon the defendant for this timber, and the injury is without redress, unless the plaintiff's claim can be supported.* The doctrine of relation, as understood and recognized both in our own and in the English courts, is applicable to this case and makes the plaintiff's title relates back to the date of application.

As enforcing the same principle, see *Grisar* v. *McDowell* (6 Wall., 363, 380); *French* v. *Spencer* (21 How., 228–240).

The doctrine of relation has been frequently enforced by this court in land cases, notably in cases of grants *in præsenti* to aid in the construction of railroads. Such grants, until the filing of the map of definite location, are mere floats and do not attach to any specific acre of land; but, upon the filing of the map of definite location, the grants relate back and take effect as of the date of the passage of the act making the grant, though many years have intervened; and if patent is issued the title dates, not from the date of the patent, but from the date of the grant; and no valid adverse right or title can be acquired by subsequent entry or purchase. *Van Wyck* v. *Knevals* (106 U. S., 360); *R. R.* v. *Phelps* (137 U. S., 528–541); *St. Paul, &c., R. R.* v. *Northern Pacific R. R.* (139 U. S., 1, 5); *U. S.* v. *Southern Pacific R. R.* (146 U. S., 570, 593).

It is submitted, therefore, that on March 2, 1889, when Congress passed this act of forfeiture and restored the land in question to the public domain, it was the resumption of title as though the same had never been out of the United States, in so far as strangers and wrongdoers are concerned, who did not set up any rights under the State of Michigan or of the railroad company, nor make any claim whatever to the property converted. Certainly as against such persons the United States had both the title to and the right of possession of property which was by them wrongfully converted at the time of such

conversion, and they can not be permitted, by the mere technicality of asserting a bare naked title in the State of Michigan, to wrongfully enrich themselves at the Government's expense.

It is contended by counsel for the defendants in error that the act of March 2, 1889 (26 Stats., 1008), does not necessarily forfeit all of these lands to the United States, because of certain exceptions embraced in the second and third sections of that act, and that hence it does not sufficiently appear that the defendants in error are not embraced in the saving provisions of those exceptions. And they contend that it was incumbent upon the plaintiffs in error to negative these exceptions both in its pleadings and proof, and they cite in support of such a contention the case of *McGlone* v. *Prosser*, 21 Wis., 273; 1 Chitty's Pleading, 275; *Varnum* v. *Orand*, 6 B. and C., 430; and *Smith* v. *Moore*, 6 Greenleaf, 227. None of these cases are authorities for the contentions made by the defendants in error, but on the contrary are authorities directly against such contention. It is never necessary to plead the whole of a statute or instrument unless the action is founded solely upon an instrument or a statute, and then only when the exception is contained in the general clause. The doctrine does not in anywise apply to the pleading of a statute where the exceptions are in separate clauses. The court will observe that the exceptions to the act of March 2, 1889, are not embraced in the general enacting clause of the act, but are contained in separate and distinct sections. As was said by Lord

Chief Justice Tenterden in the case of *Varasour* v. *Ormrod* (6 B. and C., 430, 432):

> If an act of Parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause only in pleading may set out that clause without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception, and if he state it as including an absolute, unconditional stipulation, without noticing the exception, it will be a variance.

To the same effect is the case of *McGlone* v. *Prosser* (21 Wis., 273), cited by the defendants in error. In that case there was a statute which provided that a certificate of sale of school lands issued by the commissioners shall be sufficient evidence of title to enable the purchaser to maintain an action to recover possession of such lands, etc., "unless such certificate shall have become void by forfeiture." It was held in an action of ejectment by the holder of such certificate that an averment that he is the owner thereof and entitled to the possession of the premises is not sufficient without a further averment that the certificate had not become void by forfeiture. And the court said: "This is a suit upon a statute. In pleading a statute an exception in the general clause must be stated and negatived, so as to show that the party relying upon the general clause is not within the exception," citing the same cases that are

cited in the brief for the defendants in error, and all of which are to the same effect.

The defendants in error have never claimed to be embraced within the exceptions made in sections 2, 3, 4, or 5 of the act of March 2, 1889, and do not do so now, but merely suggest the possibility of such a thing, and seek to defeat the action by this mere suggestion of a possibility without ever having made a claim or effort to show themselves entitled to the benefit of any exception contained in the act. We may safely assume that if any such exception in his favor existed it would have been alleged and proved upon the trial of the cause, and, as was said by Mr. Justice McLean in *Ross* v. *Duvall* (13 Peters, 45, 61), "the rule is well settled that to avoid a statute a party must show himself to be within its exception."

II.

We further submit that as against a mere trespasser—a mere wrongdoer, who does not pretend to have any title or right of property or right of possession in the thing converted—an equitable, a voidable, or an imperfect title or right of possession is sufficient to maintain the action of trover, and such trespasser can not attack such title or right of possession in the plaintiff, nor will it avail the defendant in such action to establish title in a third person, unless he shows connection between himself and the third person, and claims the title, possession, or right of possession under such third person. (*Terry* v. *Meterier*, 104 Mich., 50; *Stevens* v. *Gordon*, 87 Maine,

564.) The latter case was an action in trover for the value of grass cut from a highway next to plaintiff's farm, and the court held that the title to the land as against a mere trespasser was not in dispute, but only the question of possession, and that mere possession was sufficient to maintain the trover against any person except the rightful owner, and that a mere trespasser could not defeat the action by setting up title in a third person, unless he could justify his acts by authority from such person. To the same effect see *Fisk* v. *Small*, 25 Maine, 453; *James* v. *Wood*, 82 Maine, 173, 177.

In the case of *Hallock* v. *Mixer* (16 Cal., 574, 579), per Mr. Justice Field, it was held that in an action of replevin for the value of timber severed from the real estate a mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. So, in *Wheeler* v. *Lawson* (103 N. Y., 40, 46), it was held that an action of trover could not be defeated by the defendant showing title in a third person, unless he so connect himself with that third person as to show possession or right of possession by the authority of such third person.

In the case of *Jeffries* v. *Great Western Railway Company* (5 El. & Bl., 802), which was an action of trover, the defendant having failed to make out any right in himself, sought to show that by an act of bankruptcy the title had passed to the assignees. Such proof was held to be inadmissible, and Lord Campbell, after stating the general principles of the action of trover, said:

> The presumption of law is that the person who has the possession has the property. Can that pre-

> sumption be rebutted by evidence that the property was in a third person when offered as a defense by one who admits that he himself had no title and was a wrongdoer when he converted the goods? I am of opinion that this can not be done.

See in accord *Bartlett* v. *Hoyt*, 29 N. H., 317; *Burke* v. *Savage*, 13 Allen, 408; *Magee* v. *Scott*, 9 Cush., 148; *Cook* v. *Patterson*, 35 Alabama, 102; Cooley on Torts, 444, 445.

The United States, of course, did not have possession of this land *pedis possessio*, but they did have the right to the immediate possession thereof, and right to immediate possession is sufficient to maintain the action of trover. Independently of the resumption of the legal title to this land by the forfeiture act of March 2, 1889, it is notoriously and concededly true that the ten-year limit of the condition subsequent contained in the original grant of 1856 had expired without the building of this railroad, and therefore at any time after 1866 the Government had the right to immediately take possession of this land either through judicial proceedings or by Congressional enactment. That it did not do so is entirely immaterial, for actual possession is not necessary to maintain an action of trover where one is entitled to the immediate possession. When, therefore, it is said, as is sometimes done in the cases, that the plaintiff in trover must have had at the time of the conversion the right to the property and also a right of possession, nothing more can be understood than this: that the right of which he complains he had been deprived must either have been a right actually in possession or a right to immediately take possession.

In an action of trover for the value of goods wrongfully converted by defendant to his own use, the plaintiff must always succeed if he should prove either way his own right to the immediate possession of the goods. If he should not prove such right he will fail. The property in the goods is that which most usually draws to it the right of possession, and so the right to maintain an action of trover is sometimes said to depend on the plaintiff's property in the goods, and the right of immediate possession is also sometimes called a special kind of property. But these expressions are misleading. The action of trover tries only the right to the immediate possession, which may, and very frequently does, exist independently from the property in the goods. (Darlington Per. Prop., 36, 37; Cooley on Torts, 445.) And this right to immediately take possession of the land from which the timber was cut in the case at bar, and to resume title thereto, is certainly sufficient to maintain an action of trover against a mere trespasser making no claim whatever either to the property or to the possession thereof.

It is not essential in an action of trover that the plaintiff should have the absolute title; it is enough if he stands in such relation to the property that he is entitled to assert an immediate right of possession; for in such cases the plaintiff will be ultimately liable to the true owner for the value of the article unless returned to him, and a judgment in favor of the plaintiff in such action will bar any subsequent suit by the true owner against the defendant. (*Gillett* v. *Fairchild*, 4 Denio., 80;

Wallis v. *Osteen*, 38 Ga., 250; *Hardy* v. *Reed*, 6 Cush., 252.)

In this case the United States was the equitable and beneficial owner of the land from which the timber was cut, even conceding that the act of March 2, 1889, did not relate back so as to give the legal title of this land to the Government at the date of the trespass and conversion, for as we have said, the ten-year limitation of the original act had expired without the building of this road, and the Government had a right at any time by judicial or legislative proceedings to resume the title to such land, and to enter into actual possession thereof. The State of Michigan had, if anything, nothing more then a dry naked title, which it held as a trustee for the United States, in trust for a certain specific purpose which had long since failed. Even this dry naked title she had attempted to reconvey to the United States, and the governor of the State had made a deed thereof to the United States. It is therefore seen that the State of Michigan, by every effort in its power, had endeavored to reconvey this dry naked title back to the General Government, and is not making any claim to the land in this controversy.

Conceding these efforts on the part of the State to have been beyond the scope of the authority of the legislature of that State and of its governor, and that they were ineffectual for the purposes for which they were intended, and that the dry legal title, notwithstanding such acts, still remained with the State of Michigan, certainly the right of property, the right of possession, the

equitable title, was still in the United States, together with an immediate right to repossess itself of the naked legal title still outstanding in the State of Michigan. Against this title we have the willful depredation of a wrongful trespasser acknowledging the conversion of the lumber, and setting up in himself absolutely no right, title, claim, or interest of possession in or to the thing converted, but who seeks to deprive the real beneficial owner of the value of the thing thus unlawfully appropriated to his own use by technically asserting a mere naked title in the third person, without in any wise showing any claim under that third person, and the question before the court is whether or not such lawless despoilers of the public domain shall be thus permitted to deprive the Government of what is equitably and honestly its due.

If such a doctrine is to be upheld, then every acre of the public domain which has been in the past granted to the States or to corporations upon conditions subsequent, and which the slow-acting legislative or executive departments have not forfeited by appropriate proceedings, notwithstanding the failure of the conditions subsequent, are absolutely at the mercy of any vandal who chooses to strip the land of its most valuable possessions, and then evade all liability therefor by asserting a bare, naked title in someone else, without any claim of right under such person. It seems to us that the bare statement of such a doctrine should be its answer. It is therefore submitted that the decision of the learned court below was erroneous, and that the same should be

reversed, with instructions to enter a judgment in favor of the plaintiffs in error for the value of the lumber, as claimed in the petition and found in the agreed findings of fact.

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